85-1209

Supreme Court, U.S.
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NO. 85-

in the

Supreme Court

of the

United States

October Term, 1985

BERNARD KAHLENBERG,

Petitioner,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. Whether Section 19 of the Immigration and Nationality Amendments Act of 1981 makes non-preference visas available to alien investors who had filed for and qualified for investor status prior to June 1, 1978, but whose hearings were held subsequent to that date.

2. Whether an applicant for adjustment of status must prove that a commercial enterprise within the meaning of 8 C.F.R. §212.8(b)(4) exists at the time of the deportation hearing even if he had met such requirements at the time his application was filed.

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NO. 85-

In the Supreme Court of the United States

October Term, 1985

BERNARD KAHLENBERG,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

Petitioner prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Eleventh Circuit entered June 25, 1985; Petition for Rehearing denied on October 18, 1985.

OPINIONS BELOW

The Order of the United States Immigration Court denying Petitioner's Application for Investor Status and Application for Adjustment of Status to that of an alien lawfully admitted for permanent residence, is dated April 5, 1982. It is not reported and is set forth in the Appendix at page 22.

The decision of the United States Board of Immigration Appeals affirming the Order of the United States Immigration Court is dated February 21, 1984, is not reported and is set forth in the Appendix at page 18.

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the Order of the United States Board of Immigration Appeals is reported at ____ F.2d ____ (11th Cir. 1985) and is set forth in the Appendix at page 1.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit was entered on June 25, 1985. A timely Petition for Rehearing was denied on October 18, 1985, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

FEDERAL STATUTES AND REGULATIONS INVOLVED

A. 8 U.S.C. §1255: See Appendix at page 31.

B. 8 C.F.R. §212.8(b)(4)(1976): See Appendix at page 32.

C. Section 19 of the Immigration and Nationality Amendments Act of 1981, Pub.L. No. 97-116, §19, 95 Stat. 1621 (1981): See Appendix at page 32.

D. 8 C.F.R. §245.1(c)(2)(1982): See Appendix at page 33.

E. Immigration and Naturalization Service Telex to all I.N.S. regional officers dated December 30, 1981: See Appendix at page 35.

STATEMENT OF THE CASE

In May, 1976, Bernard Kahlenberg, a Canadian citizen, was admitted as a non-immigrant for business on a B-1 Business Visa. In June of 1976 he filed the appropriate applications for adjustment of status to that of a lawful permanent resident as an investor pursuant to 8 C.F.R. §212.8(b)(4). The basis for his application was his investment in B & M Holding, Inc., which had no employees other than Mr. and Mrs. Kahlenberg. B & M Holding, Inc. was doing business as Pan-Can-Am Floral Associates which bought and sold horticultural products in Florida. Pan-Can-Am employed approximately 20 employees. B & M Holding, Inc. also owned other businesses and real estate.

Mr. Kahlenberg had invested at least $10,000 in B & M Holding, Inc., as was required under the provisions of 8 C.F.R. §212.8(b)(4) (1976) in effect at the time of his filing. See Appendix at page 9.

In early June, 1979, Mr. Kahlenberg hurriedly returned to Canada to attend the funeral of his daughter who was tragically killed in an automobile accident. In his hurry Mr. Kahlenberg did not notify INS of his departure. Petitioner was inspected and questioned about the nature of his trip upon his return four days later and admitted to the United States.

On June 20, 1979, petitioner's application for adjustment of status was denied by the District Director of the Immigration Service pursuant to 8 C.F.R. §245.2(a)(3) on the ground that his departure from the United States was deemed an abandonment of the application.

In late 1979 Pan-Can-Am was declared bankrupt. B & M Holding, Inc. thereafter became dormant and had not conducted any further business at the time of the deportation hearing.

In December, 1980, petitioner sold his home and used the proceeds to begin a business called Plants, Etcetera. This business was placed in his wife's name. The court below found that Plants, Etcetera employed four employees, other than petitioner and his wife, and that approximately $20,000 had been invested in the business. This business, however, was not originally listed on Form I-526.

Respondent, United States Immigration and Naturalization Service (hereinafter "INS" or the "Agency"), issued an order to show cause in July, 1981, alleging that Petitioner Bernard Kahlenberg had remained in the United States longer than authorized and was therefore deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C §1251(a)(2).

After a deportation hearing in 1982 the immigration judge found petitioner deportable based on the fact that more than one year had elapsed since petitioner's reentry after his daughter's funeral. However the immigration judge reversed the District Director's finding that the application for adjustment of status had been abandoned. After a hearing, however, the immigration judge denied his request for relief from deportation based on his application for adjustment of status to that of a lawful permanent resident as an investor. Petitioner appealed to the United States Board of Immigration Appeals which upheld the finding of deportability and the denial of adjustment of status. That opinion was affirmed by the United States Court of Appeals for the Eleventh Circuit.

The court below looked to the basic statutory provision for adjustment of status to that of a permanent resident, which is 8 U.S.C. §1255. It provides:

> The status of an alien who was inspected and admitted or paroled in the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if
>
> > (1) the alien makes an application for such adjustment,
> >
> > (2) the alien is eligible to receive an immigrant visa and is admissable to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

The court examined each of those three requirements separately as follows:

1) **Requirement: The Alien Makes An Application For Adjustment.**

The court below made a finding of fact that Mr. Kahlenberg had satisfied this first prong of the above enumerated three-prong requirement of 8 U.S.C. §1255. The court found that Mr. Kahlenberg filed an application for adjustment of status prior to June 1, 1978.

However the the court of appeals held that Mr. Kahlenberg failed to meet the last two requirements of 8 U.S.C. §1255, and therefore denied his application and ordered him deported.

2) **Requirement: The Alien Is Eligible to Receive An Immigrant Visa and Is Admissable to the United States For Permanent Residence.**

As a non-preference visa applicant, *see* 8 U.S.C. §1153(a)(8), petitioner's eligibility for an immigrant visa and his admissability for permanent residence is dependent upon proof of either labor certification, 8 U.S.C. §1182(a)(14), or exemption from certification under 8 C.F.R. §212.8(b). 8 C.F.R. §212.8(b) (Appendix at 32) exempts certain classes of aliens, including "investors," from the statutory labor requirements.

The lower tribunal made a finding of fact that "we do not question the fact that Petitioner had met the requirements of 8 C.F.R. §212.8(b)(4) *at the time his application was filed.*" (Emphasis added.) *Kahlenberg v. INS*, Slip op. at 4728; Appendix at page 12. However, the court below held that Mr. Kahlenberg's original investment, B & M Holding, Inc., listed on Form I-526 was dormant *at the time of the hearing*, therefore he did not meet the second criteria of being eligible to receive an immigrant visa. The court of appeals likened the application to one for admission to the United States, and based on that analogy, held that it was necessary for an applicant to be eligible, at the time his application is acted on, for the preference category relied on when the application was filed.

3) **Requirement: An Immigrant Visa Is Immediately Available To Him At The Time His Application Is Filed.**

In order to establish the immediate availability of a visa as required by 8 U.S.C. §1255, the applicant must show a priority date "on the waiting list which is no later than the date shown in the [Department of State Visa] Bulletin or the Bulletin shows that the numbers for visa applicants in his category are current." 8 C.F.R. §245.1(e)(1). The fixing of priority dates are governed by 8 C.F.R. §245.1(e)(2), formerly (g)(2), which provides that "the priority date of an applicant who is seeking the allotment of a non-preference immigrant visa number shall be fixed by the following factors, whichever is the earliest . . . (ii) the date on which Form I-485 is filed if the applicant establishes that . . . the labor certification provisions of 8 U.S.C. §1182(a)(14) do not apply to him."

In 1981 Congress recognized the unavailability of visas which occurred due to a high demand and changes in immigration laws. Congress responded to the problem by enacting legislation which exempted a certain class of non-preference alien investors from the numerical limitations imposed by Sections 201 and 202 of the Immigration and Nationality Act, 8 U.S.C. §§ 1151 and 1152. Section 19 of the Immigration and Nationality Amendments Act of 1981, Pub.L. No. 97-116, §19, 95 Stat. 1621 (1981), provides:

> The numerical limitations contained in Sections 201 and 202 of the Immigration and Nationality Act shall not apply to any alien who is present in the United States *and who, on or before June 1, 1978—*
>
> (1) *Qualified as a non-preference immigrant* under Section 203(a)(8) of such act as in effect on June 1, 1978;
>
> (2) *Was determined to be exempt from the labor certification requirement* of Section 212(a)(14) of such Act because the alien had actually invested, before such date, capital in an enterprise in the United States of which the alien became a principal manager and which employed a person or persons (other than the spouse or children of the alien) who are citizens of the United States or aliens lawfully admitted for permanent residence; and
>
> (3) Applied for adjustment of status to that of an alien lawfully admitted for permanent

residence. (emphasis added). 8 U.S.C. §1151 note.

Section 19 of the Amendments to the Immigration and Nationality Act thereby made non-preference visas available to alien investors.

The lower tribunal, however, construed Section 19 to be limited only to those aliens who had been determined, prior to June 1, 1978, to be exempt from labor certification requirements and whose hearing on the application for the adjustment of status to permanent resident occurred subsequently.

The court of appeals failed to consider the more common practice, such as is the case here, of simultaneously filing both applications for exemption from labor certification requirements based upon investor status and for adjustment of status to permanent resident. The result of the order below is that the provisions of Section 19 are no longer available to all of those persons who made such simultaneous filings and were qualified prior to June 1, 1978,

REASONS FOR GRANTING THE WRIT

I

THE APPLICABILITY OF SECTION 19 OF THE IMMIGRATION AND NATIONALITY AMENDMENTS ACT OF 1981 TO THOSE ALIENS WHOSE REQUESTS FOR INVESTOR STATUS WERE PENDING AT THE TIME THE AMENDMENTS BECAME EFFECTIVE IS A SIGNIFICANT FEDERAL QUESTION OF GREAT IMPORTANCE TO THE NATION'S IMMIGRATION LAWS WHICH SHOULD BE DECIDED BY THE SUPREME COURT BECAUSE THE LOWER COURT'S OPINION INTERPRETS A FEDERAL STATUTE CONTRARY TO THE WILL OF CONGRESS AND IT HAS A SUBSTANTIAL IMPACT ON A SIGNIFICANT CLASS OF PEOPLE WHO HAVE INVESTED MONIES IN THE UNITED STATES.

The Eleventh Circuit's construction of Section 19 of the Immigration and Nationality Amendments Act of 1981 in its opinion below involves the construction and application of acts of Congress and federal administrative regulations and presents a significant federal question to be answered by the United States Supreme Court. The court of appeals misinterpreted the statute and determined that:

> Our interpretation of the statute is that Section 19 is available to those alien investors who had already been granted investor status but

were ineligible solely on the basis that visa numbers were unavailable.

Kahlenberg v. INS, Slip op. at 4729, Appendix at page 14. The court of appeals held that in order to qualify for adjustment of status, Mr. Kahlenberg was required to show a determination prior to June 1, 1978, of exemption from labor certification requirements pursuant to Section 19 of the 1981 Amendments.

The decision below will affect a large class of individuals who applied for adjustment of status prior to 1978, but have not yet been adjudicated. This decision therefore has importance far beyond the individual facts of this case and far beyond the individual Petitioner.

The House of Representatives report on Public Law 97-116 acknowledged the importance of Section 19 to those it affected:

> The beneficiaries of this section had applied for adjustment of status based on their investor status before nonpreference numbers became unavailable. In fact, INS has allowed them to remain in the United States to await an immigrant visa. Many of these alien investors came to the United States with the expectation that they could adjust to immigrant status within a reasonable time period. The Committee has been informed by the Department of Justice that approximately 500 aliens are likely to benefit by this provision.

H.R.Rep.No. 97-264, 97th Cong., 1st Sess. *reprinted in* U.S. Code Cong. and Ad. News 2577, 2605 (1981).

The question assumes additional significance because the court below construed the application of the statute in direct contravention to the intention of Congress and overlooked the Agency's own construction of Section 19. Therefore, the decision below is at war not only with the congressional purpose but also with the well-established policy of administration of the statute by the administrative agency charged with its enforcement.

On December 30, 1981, the Commissioner of Immigration sent a telegram to all officers of the Immigration and Naturalization Service, which is contained in the Appendix at page 35.

The telex sent by the Commissioner of Immigration explains the legislative intent of Section 19 of the Amendments as follows:

> The intent of Section 19 of P.L. 97-116 is to provide adjustment of status to those aliens *who filed and were qualified* for status as investors prior to June 1, 1978. (Emphasis added.)

Appendix at page 38.

The telex does not refer to any prior determination being required, but rather, merely that the applicants "filed and were qualified . . . prior to June 1, 1978." Id.

The Agency's stated purpose for sending the telex was clarification of the statute. Appendix at page 35. If the statute had contemplated a prior hearing and determination regarding exemption from labor certification requirements, then the language contained

in the INS telex regarding those aliens who "filed" for investor status would be superfluous.

The telex further provides:

> To facilitate adjustment of the affected group, regulations will reflect that they are now exempt from 212(A)(14) and 245(C)(2).

Appendix at page 38.

The INS telex and Congress unequivocably intended the statute to "facilitate" the adjustment of this particular group, not to place further impediments in the path of adjustment. Congress specifically designated this particular population to receive preferential treatment. In contrast, the opinion below works a harsh result on a large class of business people awaiting adjustment of status.

The court of appeals failed to take into consideration the entire application procedure for filing applications for adjustment of status to permanent resident and for exemption as an investor.

Inherent in the opinion below is the erroneous premise that the application for investor status is somehow determined prior to the adjustment of status. No basis exists as substantiation for that assumption, and, in fact, the procedure is quite to the contrary.

Historically, that is, prior to 1978, visas were readily available. Indeed, the Agency's regulation in effect as of January 1, 1978, recognized that both applications were normally filed together and adjudicated together

at one hearing. 8 C.F.R. §245.2(b)(1978) specifically recognized that non-preference aliens, which included investors, could seek adjustment of status.

The pragmatic intention of Section 19 of the 1981 amendments was to address those persons, like Mr. Kahlenberg, who had filed applications for investor status together with applications for adjustment, prior to June 1, 1978. Since the date of filing the documents, rather than the adjudication date, established the applicant's priority date, the June 1, 1978 cut-off date for visa availability created a group of applicants who were entitled to such priority although their applications had not yet been adjudicated. C.f., 8 C.F.R. §245.1(e)(2).

The INS cable does not refer to adjudication, but rather acknowledges that group of aliens who filed applications prior to June 1, 1978, and *were qualified* as of that date. (See Appendix at page 38.)

Federal statutes and regulations induced Mr. Kahlenberg to relocate his family in the United States and persuaded Mr. Kahlenberg, and many others like him, to invest a minimum of $10,000 into a commercial enterprise in the United States. But for this Government's enticement and promise of permanent residency, Mr. Kahlenberg would have remained in Canada and invested his monies, energies and loyalties there.

If INS had acted upon his application in 1976 when it was filed, Mr. Kahlenberg clearly would have been eligible and would have been granted permanent residency as an investor. See, *Kahlenberg v. INS*, ____ F.2d ____, slip op. at 4728, Appendix at page 12. However, due to numerous delays beyond the control of Mr. Kahlenberg,

the hearing on his applications for adjustment of status and for permanent resident was not held until 1982. Since it was standard INS operating procedure to hold one hearing on both applications, Mr. Kahlenberg was caught in a common bureaucratic web.

Mr. Kahlenberg is a sixty-five year old man who has lived and worked in this country with his wife for the past ten years. During that time he has created social roots and invested several hundred thousands of dollars into American businesses. The laws of the United States Government in effect in 1976 lured him to leave Canada, then in 1981 when the immigration laws were changed, Congress intended to protect Mr. Kahlenberg and those like him by enacting Section 19. Indeed, Congress recognized that "many of these aliens came to the United States with the expectation that they would adjust to immigrant status within a reasonable time period." H.R. Rep. 97-264, 97th Cong., 1st Sess., *reprinted in* U.S. Code Cong. and Ad. News 2755, 2605 (1981). However, Mr. Kahlenberg now faces deportation based upon the Eleventh Circuit's misinterpretation of Section 19.

Although not intended to be penal in character, the consequences of immigration laws may be far more devestating than criminal punishment because deportation inflicts "the equivalent of banishment or exile." *Tan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948). Mr. Kahlenberg is now faced with the tragic edict of having to close down his prosperous plant business in Florida and uproot his wife to start a new life in another country. It is natural for him to turn to the Supreme Court.

The court below ignored the common sense interpretation of the statute, regulations and cable, which read together, plainly require that when a member of that group who had filed an application before June 1, 1978, was subsequently adjudicated and approved, that the nature of the investment would relate back to the priority date established when the application was originally filed. Determination of this vital issue by this Court would prevent the deportation of Mr. Kahlenberg and others like him, who have made substantial investments into the American economy in reliance upon our government's promise of investor status and thus permanent residency.

II

DECISIONS OF THE ELEVENTH AND FIFTH CIRCUITS CONFLICT WITH A DECISION OF THE NINTH CIRCUIT COURT OF APPEALS AS TO WHETHER AN APPLICANT FOR ADJUSTMENT OF STATUS MUST PROVE THAT A COMMERCIAL ENTERPRISE WITHIN THE MEANING OF 8 C.F.R. §212.8(b) (4) EXISTS AT THE TIME OF THE DEPORTATION HEARING EVEN IF HE HAD MET SUCH REQUIREMENTS AT THE TIME HIS APPLICATION WAS FILED.

There is a split of authority between the Ninth Circuit Court of Appeals on the one hand and the Fifth and Eleventh Circuit Courts of Appeals regarding an issue of significant consequence to the administration of our immigration laws.

The Eleventh Circuit in its opinion below erroneously followed the reasoning in *Pei Chi Tien v. Immigration and Naturalization Service*, 638 F.2d 1234 (5th Cir. 1981), that the application for adjustment of status is equivalent to an application for admission to the United States and therefore an applicant must be eligible under 8 C.F.R. §212.8(b)(4), at the time his application is acted on, for the preference category relied on when the application was filed. Appendix at page 1.

The opinion below, however, squarely conflicts with the decision in *Gill v. Immigration and Naturalization Service*, 666 F.2d 390 (9th Cir. 1982). In *Gill* the Ninth Circuit focused upon the intent and ability of the petitioner to satisfy 8 C.F.R. §212.8(b)(4) at the time the application was filed, rather than at the time of the hearing.

The reasoning of the Ninth Circuit is compatible with the underlying immigration process, for example, priority numbers are assigned based upon the date that the application is filed rather than the date on which the hearing occurs. *See*, 8 C.F.R. §245.1(e)(2).

Moreover, the correctness of the position taken by the Ninth Circuit is supported by examining the December 30, 1981, telex sent by the Commissioner of Immigration to all officers of the Immigration and Naturalization Service regarding the interpretation of Section 19 on this matter (Appendix at page 38) which provides that "*it is not a requirement that the investor currently be maintaining* a qualified investment or that the investor maintain the same investment" in order to provide adjustment of status under §19 of Pub.L. 97-116. Telex at ¶12 (emphasis added). The Immigration and Naturalization Service amended its regulations on October

7, 1982, to recognize that an alien investor may qualify for adjustment of status *"without a present investment."* 8 C.F.R. §245.1(c)(2)(iii) (emphasis added). That regulation provides:

> Any applicant under this section may qualify [for investor status] with an investment in an enterprise other than that used to establish the applicant's priority date, or may qualify without a present investment. [Emphasis added.]

Appendix at page 34.

The impact of this conflict will be widely felt and will have continuing future consequences. The conflict should be resolved because the application of our national immigration laws should not be differently interpreted in different parts of the nation, causing some individuals to become permanent residents, while, based on the same criteria, others are deported.

This Court should resolve this split of authority among the circuits because "many of the persons who originally registered as non-preference investors but were unable to maintain their investments through the long uncertain period during which their status was in limbo are also eligible to adjust status to that of permanent resident under Section 19 of the 1981 amendments." A. Gragomen, A. Delrey & S. Bernsen, IMMIGRATION LAW AND BUSINESS, at 3-22.1 (1984).

CONCLUSION

This nation was founded by entrepreneurs from other countries. The immigration laws under consideration here are responsible for determining those foreign-born persons who will enjoy the privilege of residency in this country, and those who will not. This Court should provide a uniformity of opinion concerning these tremendously important issues upon which are based the hopes and plans of many people throughout the country who invested monies in the United States in reliance upon an act of Congress which promised residency in exchange.

The Supreme Court should accept jurisdiction over this petition for certiorari in order to satisfy the urgent need for authoritative determination of whether Congress sought to include in its protection from deportation those applicants for investor status and adjustment to permanent resident who filed and qualified prior to June 1, 1978, regardless of whether the hearing was delayed or whether the investment survived until the

actual hearing. The opinion of the Eleventh Circuit Court of Appeals below should be reversed.

Respectfully submitted, .

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BY _____
SHARON B. JACOBS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three correct copies of the foregoing brief of petitioner on jurisdiction were mailed this _____ day of January, 1986, to JAMES A. HUNOLT, ESQ., and CHARLES HAMILTON, III, ESQ., Office of Immigration Litigation, Civil Division, U.S. Department of Justice, P.O. Box 878, Washington, D.C. 20004; and to the Solicitor General, Department of Justice, Washington, D.C. 20530, and that all parties required to be served have been served.

BY _____
SHARON B. JACOBS, ESQ.

Appendix

Bernard KAHLENBERG, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 84-5196.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1985.

After deportation hearing, immigration judge found alien deportable and denied his request for relief from deportation based on application for adjustment of status to that of lawful permanent resident as investor. The Board of Immigration Appeals upheld finding of deportability and denial of adjustment status, and appeal followed. The Court of Appeals, Daniel Holcombe Thomas, District Judge, sitting by designation, held that: (1) alien's holding company and holding company's principal assets failed to constitute commercial enterprise within meaning of regulations governing investor status, and (2) alien was deportable at time of deportation hearing.

Affirmed.

1. Aliens —44

Board of Immigration Appeals' interpretation of Immigration and Naturalization Service regulations deserve great reference and control unless plainly erroneous or inconsistent with regulations.

2. **Administrative Law and Procedure —413**

Promulgating agency's construction of its own regulations is entitled to great weight and may be discounted only if clearly unreasonable.

3. **Aliens —54.1(2, 4)**

Burden of proving entitlement to status of permanent resident as investor rests upon applicant, and his proof must be unambiguous because any doubts must be resolved against him. Immigration and Nationality Act, §§ 201, 202, as amended, 8 U.S.C.A. §§ 1151, 1152; Immigration and Nationality Amendments Act of 1981, §19, 8 U.S.C.A. §1151 note.

4. **Aliens —53.10(2)**

Nonimmigrant alien must be eligible, at time his application is acted on, for preference category relied on when application for adjustment of status was filed.

5. **Aliens —53.10(2)**

Where at time of deportation hearing, investment in form of holding company which alien relied upon for adjustment status had been idle for approximately two years, and principal asset of that investment had been bankrupt for over two years, alien's holding company and holding company's principal assets failed to constitute commercial enterprise within meaning of regulations governing adjustment of alien status to that of lawful permanent resident as investor.

6. **Aliens —53.10(2)**

Provision of Immigration and Naturalization Act [18 U.S.C.A. §1151 note] which eliminated numerical requirements of Act is available to those alien investors who had already been granted investor status but were ineligible solely on basis that visa numbers were unavailable. Immigration and Nationality Act, §§ 201, 202, as amended, 8 U.S.C.A. §§ 1151, 1152; Immigration and Nationality Amendments Act of 1981, §19, 8 U.S.C.A. §1151 note.

7. **Aliens —54.3(1)**

Where record failed to indicate that issue of deportability of alien was ever raised before Board of Immigration Appeals, Court of Appeals lacked jurisdiction to consider issue.

8. **Administrative Law and Procedure —669**

If petitioner wishes to reserve issue for appeal, he must first raise it in proper forum.

9. **Aliens —53.10(2)**

To prove overstay, Immigration and Naturalization Service need only show nonimmigrant's admission for temporary period, that period has elapsed, and that nonimmigrant has not departed. Immigration and Nationality Act, §241(a)(9), as amended, 8 U.S.C. §1251(a)(9).

10. Aliens —53.1

Alien was deportable at time of deportation hearing, where alien admitted he was alien, his application for status as permanent resident clearly indicated that he entered United States under B-1 Business Visa, pursuant to which alien can be admitted for period of not more than one year, and alien failed to establish that any extensions had been granted.

Petition for Review of an Order of the United States Justice Board of Immigration Appeals.

Before RONEY and KRAVITCH, Circuit Judges, and THOMAS,* District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

An order to show cause issued in July 1981, alleged that petitioner Kahlenberg remained in the United States longer than authorized and was therefore deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(2). After a deportation hearing, the immigration judge found petitioner deportable and denied his request for relief from deportation based on his application for adjustment of status to that of a lawful permanent resident as an investor. Petitioner appealed to the United States Board of Immigration Appeals which upheld the finding of

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*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

deportability and the denial of adjustment status. Appeal to this court followed and the decision below was stayed. We affirm.

FACTS:

Petitioner is a native of Rumania and a citizen of Canada. Petitioner was admitted to the United States as a non-immigrant for business on a B-1 Business Visa in May 1976. In June 1976, petitioner applied for adjustment of status to that of a lawful permanent resident as an investor pursuant to 8 C.F.R. §212.8(b)(4). The basis of petitioner's application was his investment in B & M Holding, Inc. which had no employees other than petitioner and his wife. B & M Holding, Inc. was doing business as Pan-Can-Am Floral Associates which dealt primarily in horticultural products and employed approximately 20 employees. Petitioner's application indicated that he had invested at least $10,000 in B & M Holding, Inc.

In late 1979, Pan-Can-Am was declared bankrupt after incurring losses exceeding $100,000. B & M Holding, Inc. thereafter became dormant and has not conducted further business.

Petitioner returned to Canada in early June 1979 to attend his daughter's funeral without notifying the immigration authorities. Upon returning to the United States, approximately four days later, petitioner was inspected and questioned about the nature of his trip. After explaining that he resided in Florida and had gone to Canada to attend his daughter's funeral, petitioner was then admitted. On June 20, 1979, petitioner's application for adjustment of status was denied by the

District Director of the Immigration Service pursuant to 8 C.F.R. §245.2(a)(3) on the ground that petitioner's departure from the United States was deemed an abandonment of the application.

In December 1980, petitioner sold his home and used the proceeds to begin a business called Plants, Etcetera. The business was placed in his wife's name. The record indicates that Plants, Etcetera employed four employees, other than petitioner and his wife, and that approximately $20,000 had been invested in the business. This business, however, was not listed on Form I-526.

In July 1981, an order to show cause was issued alleging that petitioner had remained in the United States longer than authorized pursuant to 8 C.F.R. §214.2(b)(1), 8 U.S.C. §1251(a)(2). 8 C.F.R. §214.2(b)(1) provides that any B-1 visitor for business or B-2 visitor for pleasure may be admitted for a period of not more than one year, however, the visitor may be granted extensions of a temporary stay in increments not exceeding six months each. After a hearing, the immigration judge found petitioner deportable based on the fact that petitioner had entered the United States in June 1979 without the proper documents for admission into the United States. Specifically, the immigration judge found that petitioner's admission into the United States, upon his return from Canada, could have been only that of a visitor for business or pleasure (or some other non-immigrant category) and therefore petitioner was subject to the one year time period. The immigration judge concluded that petitioner was deportable since more than one year had elapsed since his return from Canada and petitioner failed to provide evidence of any extension.

The immigration judge upheld the denial of adjustment status on the ground that petitioner was statutorily ineligible to qualify as an investor. The immigration judge found that B & M Holding, Inc. which served as the basis for petitioner's adjustment of status application, was insufficient to establish investor status under either 8 C.F.R. §212.8(b) or §212(a)(14) of the Immigration and Nationality Act because: (1) B & M Holding became dormant upon Pan-Can-Am's bankruptcy; (2) B & M Holding did not employ any United States citizen or lawful permanent residents other than the Kahlenbergs; and (3) Petitioner had not been determined to be exempt from the labor certification requirements of Section 212(a)(14) of the Act. The judge further found that petitioner's subsequent investment in Plants, Etcetera, did not constitute a continuing enterprise derived from the earlier investment in B & M Holding, Inc.

On appeal, the Board of Immigration Appeals dismissed petitioner's appeal on the grounds that petitioner did not establish his eligibility for investor status at the time of the hearing and, further, that petitioner was never determined to be exempt from the labor certification requirements.

STANDARD FOR REVIEW

[1, 2] The Board's finding that Kahlenberg was statutorily ineligible for adjustment of status is subject to appellate review for errors of law. *Ka Fung Chan v. Immigration and Naturalization Service*, 634 F.2d 248 (5th Cir. 1981); *Pei-Chi Tien v. Immigration and Naturalization Service*, 638 F.2d 1324 (5th Cir. 1981). It must be noted, however, that the Board's interpretation

of INS Regulations deserves great deference and controls unless plainly erroneous or inconsistent with the regulations. *U.S. v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977). The promulgating agency's construction of its own regulations is entitled to great weight and may be discounted only if clearly unreasonable. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

LEGAL DISCUSSION

Petitioner contends that the immigration judge and the Board of Immigration Appeals erred in finding him statutorily ineligible for adjustment of status as an investor and denying his application for same.

The basic statutory provision for adjustment of status to that of a permament resident is 8 U.S.C. §1255. It provides:

> The status of an alien who was inspected and admitted or paroled in the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

As a non-preference visa applicant, *see* 8 U.S.C. §1153(a)(8), petitioner's eligibility for an immigrant visa

and his admissibility for permanent residence is dependent upon proof of either labor certification, 8 U.S.C. §1182(a)(14), or exemption from certification, 8 C.F.R. §212.8(b). 8 C.F.R. §212.8(b) exempts certain classes of aliens, including "investors", from the statutory labor requirements. At the time Kahlenberg's application for adjustment of status was filed, 8 C.F.R. §212.8(b)(4) exempted:[1]

> An alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actually in the process of investing, capital totalling at least $10,000, and who establishes that he has had at least 1 years' experience of training qualifying him to engage in such enterprise.

In order to establish the immediate availability of a visa as required by 8 U.S.C. §1255, the applicant must show a priority date "on the waiting list which is no later than the date shown in the [Department of State Visa] Bulletin or the Bulletin shows that the numbers for visa applicants in his category are current." 8 C.F.R. §245.1(e)(1). The fixing of priority dates are governed by 8 C.F.R. §245.1(e)(2), formerly (g)(2), which provides:

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[1]On October 7, 1976, subsequent to petitioner's application, 8 C.F.R. §212.8(b)(4) was amended to require (1) investment of capital totalling at least $40,000 in an enterprise in the United States in which he will be principal manager; and (2) employment of at least one person who is a United States citizen or an alien lawfully admitted for permanent residence, exclusive of the alien, his spouse and children.

> The priority date of an applicant who is seeking the allotment of a non-preference immigrant visa number shall be fixed by the following factors, whichever is the earliest. . . . (ii) The date on which Form I-485 is filed if the applicant establishes that. . . . the labor certification provision of 8 U.S.C. §1182(a)(14) do not apply to him. . . .

Due to the demand for visas and changes in the immigration laws, Congress, in 1981, exempted a narrowly defined class of non-preference alien investors from the numerical limitations imposed by Sections 201 and 202 of the Immigration and Nationality Act, 8 U.S.C. §§ 1151 and 1152. Section 19 of the Immigration and Nationality Amendments Act of 1981 Pub.L. No. 97-116 §19, 95 Stat. 1621 (1981), provides:

> The numerical limitations contained in Sections 201 and 202 of the Immigration and Nationality Act shall not apply to any alien who is present in the United States *and who, on or before June 1, 1978* —
>
> (1) Qualified as a non-preference immigrant under Section 203(a)(8) of such act (as in effect on June 1, 1978);
>
> (2) *Was determined to be exempt from the labor certification requirement* of Section 212(1)(14) of such Act because the alien had actually invested, before such date, capital in an enterprise in the United States of which the alien became a principal manager and which

employed a person or persons (other than the spouse or children of the alien) who are citizens of the United States or aliens lawfully admitted for permanent residence; and

(3) Applied for adjustment of status to that of an alien lawfully admitted for permanent residence. 8 U.S.C. §1151 note (emphasis added).

Section 19 of the Amendments to the Immigration and Nationality Act thereby made non-preference visas available to alien investors who had achieved investor status prior to the unavailability of non-preference visa numbers. H.R.Rep. No. 264 at 36; 1981 U.S.Code Cong. and Ad. News 2577, 2605.

[3] Although an applicant may be denied resident status by the District Director, his application may be renewed before an immigration judge during deportation proceedings. 8 C.F.R. §245.2(a)(4). However, the burden of proving entitlement rests upon the applicant, *Wang v. Ins.*, 602 F.2d 211, 214 (9th Cir. 1979); *Sanghavi v. Ins.*, 614 F.2d 511, 513 (5th Cir. 1980), and his proof must be unambiguous because any doubts must be resolved against him. *Yung Tsang Chiu v. U.S. Dept. of Justice*, 706 F.2d 774, 777 (6th Cir. 1983); *Wang v. Ins., supra* at 214.

In support of his contention, petitioner argues that at the time his application was filed, his investment in B & M Holding, Inc. qualified him for investor status. Petitioner bases his argument on his submission of Form I-526, which indicated that he had actually invested the requisite amount of capital in a commercial or agricultural enterprise as provided by 8 C.F.R.

§212.-8(b)(4),[2] and Section 19 of the Immigration and Nationality Amendment Act of 1981.

[4, 5] We do not question the fact that petitioner had met the requirements of 8 C.F.R. §212.8(b)(4) at the time his application was filed. However, an application for adjustment of status is equivalent to an application for admission to the United States. An application such as this is a continuing one and, in light of the non-immigrant alien's assimilation to the position of an applicant for entry, he must be eligible, at the time his application is acted on, for the preference category relied on when the application was filed. *See Matter of Ketema*, I & N Dec. 2911 (BIA 1982); *Pei-Chi Tien v. Immigration and Naturalization Service*, 638 F.2d 1324, 1328 (5th Cir. 1981). It was therefore necessary for petitioner to establish his eligibility at the time of the deportation hearing. The record clearly indicates that, at the time of the deportation hearing, the investment which petitioner relied upon for adjustment status had been idle for approximately 2 years. Furthermore, the principal asset of said investment had been bankrupt for over 2 years. The regulations, as understood by this court and as interpreted by the service, contemplate that the investment for which adjustment of status is relied upon must be productive of a service or commodity. *See Matter of Heitland*, 14 I & N Dec. 563 (BIA 1974); *Matter of Caralekas*, I & N Dec. 2333 (BIA 1975). The immigration judge and the Board of Immigration Appeals concluded that petitioner's holding company (B & M), and the holding company's principal asset (Pan-Can-

[2]It is undisputed that Kahlenberg has met the experience requirement of 8 C.F.R. §212.8(b)(4).

Am Floral Associates), failed to constitute a commercial enterprise within the meaning of the regulations.

Based on the above, we cannot find such a determination clearly erroneous and, therefore, agree with the tribunal below. Petitioner's reliance on *Gill v. Immigration and Naturalization Service*, 666 F.2d 390 (9th Cir.1982) is misplaced. In *Gill*, the court interpreted that portion of 8 C.F.R. §212.8(b)(4) which requires the alien to establish that he has invested, "or is actively in the process of investing" capital in an enterprise. The Ninth Circuit Court of Appeals held that the "critical inquiry is whether, at the time of his application, the alien is pursuing an ongoing and systematic plan to invest the requisite amount", *Gill v. Immigration and Naturalization Service, supra* at 393. Although it may appear that the holding in *Gill* aids petitioner, it does not. In *Gill*, the court was concerned with whether evidence of subsequent expenditures by the alien would "trace back" to the enterprise listed in the application since, at the time of the application, the alien failed to persuade the immigration judge and the BIA that he had actually invested the requisite amount of capital. In the present case there is no dispute that petitioner had invested the required amount of capital at the time of his application.

[6] Petitioner further maintains that he was exempt from having to establish the immediate availability of an immigrant visa pursuant to Section 19 of the Immigration and Nationality Amendments Act of 1981 which eliminated the numerical requirements of Sections 201 and 202 of the Immigration and Nationality Act. Petitioner argues that the amended section requires

only that he actually invest capital prior to June 1, 1978, and that the language of the statute does not require that a determination of exemption be made before June 1, 1978. We cannot agree. As noted above, the promulgating agency's construction of its own regulations may be discounted only if clearly unreasonable. *Udall v. Tallman, supra.* In any event, our reading of the statute is entirely consistent with that advanced by the Service. The statute specifically states that only the numerical limitations contained in Sections 201 and 202 of the Immigration and Nationality Act shall not apply to one who: *"on or before June 1, 1978, . . . was determined to be exempt from the labor certification requirements . . ."* (emphasis added). The record is devoid of any evidence indicating that petitioner's application for adjustment of status as an investor was granted, or that his investment in B & M Holding, Inc. was approved by the Service prior to June 1, 1978. Our interpretation of the statute is that Section 19 is available to those alien investors who had already been granted investor status but were ineligible solely on the basis that visa numbers were unavailable.

[7, 8] Petitioner also raises the issue of whether the immigration judge erred in concluding that Mr. Kahlenberg's return to the United States on or about June 5, 1979, was an official "entry" as a visitor which entitled him to remain in the United States for not more than one year, absent a grant or extension. Petitioner argues that, since the immigration judge determined that petitioner's return to the United States on or about June 5, 1979, did not constitute an abandonment of his application for adjustment of status, such a finding precludes a further finding that petitioner's return constituted an official "entry" into the country.

Consequently, petitioner argues that he was not deportable at the time of the deportation hearing. This issue is not properly before this court. The record fails to indicate that the issue of deportability was ever raised before the Board of Immigration Appeals, therefore, this court lacks jurisdiction to consider this issue. *Ka Fung Chan v. Immigration and Naturalization Service*, 634 F.2d 248, 258 (5th Cir. 1981). If a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper forum. *Tejeda-Mata v. Immigration and Naturalization Service*, 626 F.2d 721, 726 (9th Cir. 1980); *See* 8 U.S.C. §1105a(c).

[9] In any event, it would be unnecessary to determine whether petitioner's return constituted an official "entry" for purposes of deportation. 8 U.S.C. §1251(a)(9) provides that any alien in the United States shall be deported who: "(9) was admitted as a non-immigrant and *failed to maintain the non-immigrant status in which he was admitted* or to which it was changed. . . ." (emphasis added). Petitioner was found deportable because he had remained longer than authorized. To prove "overstay", the Service need only show a non-immigrant's admission for a temporary period, that the period has elapsed, and that the non-immigrant has not departed. *Ho Chang Tsao v. Immigration and Naturalization Service*, 538 F.2d 667, 678 (5th Cir. 1976), *cert. denied*, 430 U.S. 906, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977); *Milande v. Immigration and Naturalization Service*, 484 F.2d 774 (7th Cir. 1973); *Akhbari v. Immigration and Naturalization Service*, 678 F.2d 575, 577 (5th Cir. 1982).

[10] Petitioner admitted he was an alien. His application for status as a permanent resident clearly

indicates that he entered the United States in May 1976, under a B-1 Business Visa. An alien admitted under a B-1 Business Visa may be admitted for a period of not more than one year, however, he may be granted extensions in increments of six months each. 8 C.F.R. §214.2(b)(1). Petitioner has failed to establish on the record that any extensions have been granted. Accordingly, Mr. Kahlenberg was deportable at the time of the deportation hearing.

CONCLUSION

Based on the foregoing reasons, WE AFFIRM.

[FILED OCT 18 1985]

IN THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 84-5196

BERNARD KAHLENBERG,
Petitioner,

versus

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(October 18, 1985)

Before RONEY and KRAVITCH, Circuit Judges and THOMAS, District Judge*. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

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*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama.

[FEB 21 1984]

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

Washington, D.C. 20530

File: A20 418 156—Miami

In re: BERNHARD KAHLENBERG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Henry H. Held, Esquire
Held and Stern
111 S.W. 3rd Street
P.O. Box 014381
Miami, Florida 33130

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) —Nonimmigrant—remained longer than permitted

APPLICATION: Adjustment of status

In a decision dated April 5, 1982, the immigration judge found the respondent deportable and denied his application for adjustment of status, but granted him voluntary departure. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 64-year-old native of Rumania and citizen of Canada who last entered the United States on June 5, 1979. Deportability has not been contested, so the sole issue on appeal concerns the immigration judge's denial of adjustment of status.

The respondent seeks to adjust his status as a nonpreference immigrant who is exempt from the labor certification requirement as an investor pursuant to 8 C.F.R. 212.8(b)(4). He filed an application for investor status on the basis of an investment in B&M Holding Inc., a company solely owned by the respondent and his family, which was doing business as Pan-Can-Am Floral Associates. At deportation proceedings, the respondent testified that the florist business went bankrupt in 1979 and that the holding company, which never had any employees, became dormant 6 to 8 months thereafter. The immigration judge determined that the respondent did not qualify as an investor because the florist business was bankrupt and the holding company did not constitute a continuing business enterprise.

On appeal, the respondent contends that the immigration judge erred in finding him ineligible for investor status. He argues that his holding company, which was doing business as a florist shop, employed 20 people and therefore should qualify him for adjustment of status pursuant to an amendment to the statute eliminating numerical limitations for qualified investors.

See Immigration and Nationality Act of December 29, 1981, Pub. L. No. 97-116, section 19, 95 Sat. 1621; H.R. Rep. No. 97-264, 97th Cong., 1st Sess. 35, *reprinted in* 1981 U.S. Code Cong. & Ad. News 2577, 2604.

An application for adjustment of status is the equivalent of an application for admission to the United States. Such an application is a continuing one, and admissibility is determined on the basis of the facts existing at the time the application is finally considered. *See Matter of Ketema*, Interim Decision 2911 (BIA 1982). Consequently, it was incumbent upon the respondent to establish his eligibility for investor status at the time of the hearing. Inasmuch as the respondent's florist business was bankrupt and his holding company was defunct at that time, the immigration judge properly concluded that the respondent was not engaged in a commercial enterprise within the meaning of the regulations. *See Matter of Caralekas*, 15 I&N Dec. 142 (BIA 1975); *Matter of Heitland*, 14 I&N Dec. 563 (BIA 1974). Furthermore, since the respondent was never determined to be exempt from the labor certification requirement as an investor, the 1981 amendments to the Act relating to numerical limitations have no applicability to this case. *See* 8 C.F.R. 245.1(c)2)(i)(D). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be

granted by the District Director; and in the event of his failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan

Chairman

UNITED STATES IMMIGRATION COURT

IN THE MATTER OF:
BERNHARD KAHLENBERG

RESPONDENT IN DEPORTATION PROCEEDING

April 5, 1982

File No. A-20 418 156

DECISION

The Respondent is a 62-year-old male, native of Roumania, citizen of Canada. It is alleged that he last entered the United States on or about June 5, 1979, and it is alleged that he was then admitted as a visitor for business and authorized to remain in the United States not to exceed one year. It is alleged that he has remained in the United States for more than one year following admission without permission of the Immigration and Naturalization Service.

The Respondent in this case has denied that he is deportable from the United States. He has denied that he was admitted as a visitor and authorized to remain for a period not to exceed one year. The basis of the denial of the Respondent is that he presented himself for pre-flight inspection in Montreal, Canada. He was not asked any questions as to his citizenship. He merely indicated to the inspecting officer that he was returning to his home in Florida where he had a business. It is his testimony that he was allowed to board the plane and

that he, in fact, came to Miami, Florida, and resumed residing there.

The Respondent has admitted that he is not a citizen of the United States. He has admitted that he is a native of Roumania and a citizen of Canada. He has admitted that he entered the United States at Miami, Florida, on or about June 5, 1979. On the basis of his testimony, I find that, since he is a citizen of Canada and that he has testified that he had no documents and presented no documents for admission to the United States, it is my finding that he presented himself for inspection and that he was admitted and that, under the circumstances, the only admission that could have been extended to him would have been that of a visitor for pleasure or business, or in some nonimmigrant category, and that the maximum period without extensions for such category would be one year. I am satisfied, therefore, that the allegations have been sustained, and that deportability has been established as charged on the Order to Show Cause by evidence which is clear, convincing and unequivocal.

The Respondent has indicated that, in the event it becomes necessary that he be deported from the United States, that he be deported to Canada. I have designated Canada.

The Respondent has applied for relief from deportation by resubmitting an application for adjustment of status under Section 245 of the Immigration and Nationality Act, based on previous status as an investor. He has also applied for relief from deportation by voluntary departure from the United States.

Contained in the record is the previous application for adjustment of status under 245 and the attachments as Exhibits No. 2. That Exhibit is a composite exhibit. It consists of the Form I-485, the Form I-526, an application for waiver of certain exclusion grounds under Section 212-(h) of the Act, some supporting documents to that application, a letter from the District Director dated April 27, 1978 advising the Respondent that his application for waiver of grounds of excludability was granted, subsequently a letter from the District Director indicating that, because of certain factors occurring subsequent to the grant that the District Director was reconsidering the grant of waiver exclusion grounds; and then, finally, a decision on Form I-291 to the REspondent denying his application for adjustment of status under Section 245 of the Act. Exhibit 3 in the record is a sworn statement by the Respondent. Exhibit 4 is a Mandate from the District Court of Appeals, State of Florida, indicating that charges on which the Respondent has been convicted were reversed, and indicating that he was not guilty or convicted of the crimes alleged. Finally, Exhibit No. 5 in the record is an investigative report dated July 22, 1981.

The Respondent has testified in this hearing that he was in business as B&M Holding Company in Florida and, on the basis of that holding company, he applied for investor status in the United States. He has indicated that the holding company held various properties. Included amongst those properties was an organization known as the Pan-Can-Am Floral Associates.

The Respondent testified that, on or about the end of 1979, Pan-Can-Am Floral Associates, a corporation owned by himself, his wife, and his children, went into bankruptcy, and that a few months later B&M Holding, Inc., became a defunct company. He further testified that, in the latter part of 1980, about December of 1980, he and his wife sold their residence and, with the proceeds of that residence, created a new business which now exists and which is solely in the wife's name. He has testified that he and his wife treat the proceeds of that business as common proceeds and that he assists his wife in the management and the operation of the business. He testified that the current business has four employees, none of whom are related to him or his wife. He testified that the investment in this current business was about $20,000.

The applicant testified that the B&M Holding Company, which served as a basis for his original application for investor status in the United States, consisted of himself and his wife, and that it had no employees. The Pan-Can-Am Floral Associates, one of the holding company's assets, did have employees.

The theory of the Respondent's application for investor status is under the House of Representatives Act No. 4327 which amends the provisions of Section 201 and 202 of the Immigration and Nationality Act, in that it provides that investors who were present in the United States on or before June 1, 1978 and qualified as non-preference immigrants under Section 203-(a)(8) of that Act, as it was in effect on June 1, 1978, and was determined to be exempt from labor certification requirements of Section 212(a)(14) because the alien had actually invested before such date, etc.; and, third,

applied for adjustment of status to that of an alien lawfully admitted for permanent residence.

I am satisfied that the Respondent was in the United States on or before June 1, 1978. The Government alleges, and the basis of the denial of the 245 application, cites a departure by the respondent from the United States in the latter part of May 1979 when his daughter deceased in Canada. The Respondent has testified that he was absent from the United States for some four days attending her funeral, and that he returned to the United States at that time. He has testified that he did not obtain permission of the Immigration and Nationality Service to depart the United States, but that it was an emergency situation, and that he did not think of this necessity at the time he left. It is his testimony that, when he returned, he returned to his residence and his business in Florida. Based on the provisions of 8 CFR 245 which provides that the departure of an alien from the United States when not under a deportation proceeding shall not be considered as an abandonment of his application under that Section, unless it is determined that the absence was other than unintended, innocent and casual. The Respondent has testified that he was inspected, or that he did, in fact, present himself for inspection at the time that he made his return to the United States.

On the basis of the record and the testimony before me, I find that the departure to attend his daughter's funeral in Canada does not necessarily terminate the application for adjustment of status under Section 245. I do not deem that, under these circumstances, the application was actually abandoned.

The Respondent, by submitting his Exhibits 4 and 3, has indicated that he was not convicted of crimes of which he was charged by the State of Florida and that, in view of the fact that he was exonerated from these crimes by the 4th District Court of Appeals, State of Florida, that the intention stated by the District Director to withdraw previously approved exemption from exclusion provisions, that such withdrawal should not have occurred. However, I do not deem this to be an integral or necessary part of my decision in this case, and make no finding in that regard.

I am satisfied that the status of the Respondent could be adjusted in the United States, if he, in fact, met the requirements of Section 19 of HR 4327. I, however, find that he does not meet those requirements.

It is my interpretation of this particular Act that, in order to be eligible for exemption from the numerical limitation requirements of 201 and 202, that an alien must have been found to be exempt from the labor certification requirements of 212(a)(14), because of an investment which qualified him as an investor.

The investment which is contained on the I-526, the B&M Holding Company, has been described as an organization consisting of the Respondent and his wife solely without employees. There has been evidence presented to indicate that a sum in excess of $10,000 was put into that organization. However, in view of the fact that the only principle asset of B&M Holding Company was the business which is described as Pan-Am-Can Floral Associates, I cannot find that B&M Holding, Inc., would have served as a satisfactory basis for a finding of an investor status: (1) because the

organization did not employ directly any United States citizens or lawful permanent residents and only employed, in fact, the Respondent and his wife. Further, if I consider Pan-Can-Am Floral Associates to be the organization which serves as the basis for the investor exemption, then the fact that that organization became bankrupt in the latter part of 1979 without ever satisfying the District Director or receiving approval as an organization or an investment which would provide the Respondent with exemption from Section 212 (a)(14), requires me to find that neither B&M Holding or Pan-Can-Am Floral Associates, either separately or together, form a satisfactory basis as the required investment to provide an exception to the 212(a)(14) requirement of the law.

The Respondent has not produced any evidence nor does it appear that a priority date was established with the American Counsel on the basis of this investment or any other investment. It appears that the only application for investor status has been the I-526 now in the record as Exh. #2. That application was never granted by the District Director nor accepted as being a legitimate basis for investor status. Indeed, it was denied by the District Director as of date June 20, 1979. In the interim, B&M Holding, Inc., has become a defunct organization; and the other organization, Pan-Can-Am Floral Associates, became bankrupt.

I cannot find that the current investment, which is in the name of the wife only and which was funded with some $20,000 total, could satisfy a requirement of a continuing business enterprise, in view of the fact that Pan-Can-Am Floral Associates became bankrupt, then it must be assumed that all of the assets of that

organization were, in fact, consumed in the bankruptcy proceedings. Indeed, it is the testimony of the Respondent that the funds from the current investment were the product of the sale of their private dwelling place. Therefore, I do not find any evidence to indicate that this current business enterprise is a continuation of previous businesses in the United States.

The amendments to Section 201 and 202, as contained in HR 4327, in my opinion, exempt only the numerical limitation requirements of the law. In my opinion, all other requirements under Secton 245 of the Act must be met in order for an adjustment under that Section, as an investor, to be granted. I do not have before me any viable enterprise which is sufficient to provide a base for investor status; and indeed, the only claim by the Respondent and his counsel is that the Respondent is entitled to adjustment of status on the basis that he was in business before June 1, 1978. I cannot find that this satisfies the requirements for adjustment of status under Section 245; and I must, therefore, deny the application.

The Respondent has applied for voluntary departure, and the Government does not oppose voluntary departure in this case. Therefore, in the exercise of my discretion, I will grant voluntary departure, such departure to occur on or before May 5, 1982 or within any extension time as granted by the District Director.

ORDER

It is ordered that the Respondent be deported from the United States pursuant to the charge contained on the Order to Show Cause. It is further ordered that, in lieu of deportation, the Respondent be granted a period of voluntary departure until May 5, 1982, or any extension of time as granted by the District Director. It is further ordered that his application for adjustment of status as an investor under Section 245 of the Act be denied. It is further ordered that, in the event the Respondent does not depart the United States within the period of voluntary departure that I have prescribed or any extension by the District Director, that without further notice my order of voluntary departure will become an order of deportation, and he will be deported to Canada.

_____

WILLIAM F. NAIL, JR.
UNITED STATES
IMMIGRATION JUDGE

* * *

8 U.S.C. §1255 provides:

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

(b) Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under sections 1152(e) or 1153(a) of this title within the class to which the alien is chargeable for the fiscal year then current.

(c) The provisions of this section shall not be applicable to (1) an alien crewman; (2) an alien (other than an immediate relative as defined in section 1151(b) of this title or a special immigrant described in section 1101(a)(27)(H) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status; or (3) any alien

admitted in transit without visa under section 1182(d)(4)(C) of this title.

(As amended Oct. 20, 1976, Pub.L. 94-571, §6, 90 Stat. 2705; Dec. 29, 1981, Pub.L. 97-116, §5(d)(2), 95 Stat. 1614.)

* * *

8 C.F.R. §212.8(b)(4) (1976) provides:

(b) The following persons are not considered to be within the purview of [section 1182(a)(14)] of the Act and do not require a labor certification:

(4) an alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of the investing, capital totaling at least $10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise.

* * *

Section 19 of the Immigration and Nationality Amendments Act of 1981, Pub. L. No. 97-116 §19, 95 Stat. 1621 (1981), 8 U.S.C. §1151 note, provides:

The numerical limitations contained in sections 201 and 202 of the Immigration and Nationality Act shall not apply to any alien who is present in the United States and who, on or before June 1, 1978—

(1) qualified as a nonpreference immigrant under section 203(a)(8) of such Act [section 1153(a)(8) of this title] (as in effect on June 1, 1978);

(2) was determined to be exempt from the labor certification requirement of section 212(a)(14) of such Act [section 1182(a)(14) of this title] because the alien had actually invested, before such date, capital in an enterprise in the United States of which the alien became a principal manager and which employed a person or persons (other than the spouse or children of the alien) who are citizens of the United States or aliens lawfully admitted for permanent residence; and

(3) applied for adjustment for status to that of an alien lawfully admitted for permanent residence.

8 C.F.R. 245.1(c)(2) (1982) provides:

Nonpreference investors.—(i) Any alien investor, if otherwise qualified, is eligible for adjustment of status if:

(A) The applicant was present in the United States on or before June 1, 1978;

(B) The applicant qualified as a nonpreference immigrant under section 203(a)(8) of the Act as in effect on June 1, 1978;

(C) The applicant applied for adjustment of status on or before June 1, 1978;

(D) The applicant was determined to be exempt

from the labor certification requirement of section 212(a)(14) of the Act because the applicant had actually invested capital in an enterprise in the United States before that date.

(E) The applicant was a principal manager of that enterprise; and

(F) That enterprise employed one or more U.S. citizens or permanent residents other than a spouse or child of the applicant.

(ii) The employment of the U.S. citizen or permanent resident may have occured at any time and for any period of time in the enterprise or any subsequent enterprise.

(iii) Any applicant under this section may qualify with an investment in an enterprise other than that used to establish the applicant's priority date, or may qualify without a present investment.

(iv) Any applicant will have qualified as a nonpreference immigrant on or before June 1, 1978 for purposes of this section, if the application for investor status was actually approved on or before that date, or the application was subsequently approved with a priority date on or before June 1, 1978.

(v) Any alien qualified under this subsection is exempt from the restrictions of sections 212(a)(14) and 245(c)(2) of the Act.

(vi) A spouse or children of an investor qualified under this section also may apply for adjustment of status.

* * *

TELEX

Fm commr (coexm) INS Washington DC

To all INS regional offices
all INS district directors
all INS file control offices

Bt

(Section one of two)

Bejek 12/30/81. Citation for immigration and nationality act amendments of 1981 is PL 97-116 (95 Stat. 1611). The following are points of clarification on items from my prior wire:

1. M-1's will be controlled to greater degree than F-1's. Proposed regs on both F's & M's will be forthcoming.

5. A regulation is being written to clarify the intent of the five-year exemption of 212(a)(17). An alien must have spent five continuous years outside repeat outside of the United States to qualify for exemption from the permission to reapply provision. However, any time spent in the United States under a section 212(d)(3) waiver of 212(a)(17) will not be interruptive of the five year period. The burden of proof is upon the alien to establish the five year absence.

6. The definition of marijuana contained in 21 U.S.C. 802.15 will be used in adjudicating 212(h) waivers under the amended statute. (quote) The term "marijuana" means all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. (unquote) The burden of establishing eligibility is on the applicant. However, "best evidence" rules should apply. Records of conviction, trial transcripts and arrest reports are normally "best evidence". If unobtainable, the applicant's sworn statement as to amounts involved would be "best evidence" if the statement does not conflict with other evidence on record. Form I-601 is being modified to provide for 212(h) waivers of excludability under 212(a)(23). The existing form may be used until the revised form is available.

7. Sections 212(a)(32) and 212(j)(1)(b) have been amended to provide that a graduate of a medical school who was fully and permanently licensed to practice medicine in a state on Jan. 9, 1978 and who was practicing medicine in a state on that date shall be considered to have passed parts I and II of the National Board of Medical Examiners Examination (NBMEE). Practice of medicine includes participation in a medical residency training program. Foreign Medical Graduates (FMGS)

coming to receive graduate medical education or training and who have been issued an IAP-66 by the ECFMG have been determined to have passed the NBMEE or have been granted a waiver by the Federal Substantial Disruption Waiver Board. Aliens who do not qualify for special immigrant status under the new Section 101(a)(27)(h) because they did not enter under H or J visa classification or because they departed the United States, may now be eligible for occupational preference classification if they are considered to have passed the NBMEE as a result of these amendments.

8. Section 101(a)(27)(h) is intended to apply to adjustment of status of qualifying FMG's and accompanying dependents in the U.S. In addition, special immigrant visas can be issued to spouses and children abroad as accompanying aliens. In order to qualify under this provision, the FMG must have entered repeat entered as an H or J nonimmigrant. Obtainment of H or J status after entry is not qualifying, although FMG's and their dependents are defined as special immigrants by PL 97-116, each alien granted permanent residence under Section 101(a)(27)(h) must be counted against the worldwide limitation and country limitations. A visa number is not required from the visa office, but in each case where an alien is adjusted as a 101(a)(27)(h) special immigrant, a copy of the approved form I-181 must be forwarded to the visa office. The form I-181 should be noted by checking the "other law" block and by entering PL 97-116 and 101(a)(27)(h). The class of admission symbol for the principal FMG who is adjusted is SJ-6 with symbol SJ-7 for the spouse and children. For further notations of the I-181 see Section 12 of this wire. If an FMG's spouse and/or children are abroad and require the issuance of an immigrant visa as an accompanying

alien, a copy of form I-181 should be forwarded to the appropriate consular officer as provided in OI 245.7(a). The visa symbol and class of admission for these aliens will be SJ-2. You may now accept and process Section 101(a)(27)(h) cases.

9. Any reentry permit whose initial period of validity expires on or after Dec. 29, 1981 and before Dec. 29, 1982 is automatically extended for a total maximum validity of two years from date of issuance without the filing of subsequent application or fee. Any immigration officer or consular officer may add this authorized extension to the permit.

If form I-131 has been submitted as an extension request every effort should be made to return the fee prior to acceptance and recording. Fees recorded on or after Dec. 29, 1981 may be refunded only upon written request. Extension applications will not be accepted after the date of this wire.

12. The intent of Section 19 of PL 97-116 is to provide adjustment of status to those aliens who filed and were qualified for status as investors prior to June 1, 1978. It is not a requirement that the investor currently be maintaining a qualifying investment or that the investor maintain the same investment. To facilitate adjustment of the affected group, regulations will reflect that they are now exempt from 212(a)(14) and 245(c)(2).

The class of admission symbol for investors adjusted under Section 19 will be NP-8 and their dependents will be NP-9. As in the case of the FMG's, each alien adjusted under this provision must be reported to the visa officer. A form I-181 with the "other law" block

checked and noted, PL 97-116 Section 19, will be forwarded to the visa office for each alien adjusted.

Since all the investors who qualify under this Section must have applied for adjustment before June 1, 1978, their security checks and medicals are now out of date. Each applicant will be required to submit new fingerprint charts and G-325's and obtain new medicals. It will not be necessary to forward a copy of the G-325 to the consular office where the applicant's nonimmigrant visa was issued or where he last resided abroad. Section 19 is intended to include the spouse and children of an investor if they also applied for adjustment of status or are applying for adjustment of status. No accompanying or following to join visas will be issued to dependents of these investors.

The service is required to furnish reports to congress on a quarterly basis concerning aliens who are adjusted under Section 5 and 19. In order to collect the necessary data, a copy of form I-181 completed in each Section 5 or 19 case must be forwarded promptly to COSTA, Attn: Roger Kramer, Room 5020, on a weekly basis. This is extremely important and each district director and officer in charge must establish procedures to insure that this is done in each case.

In addition to normal information included on the form I-181. The following information must be noted in the remarks block of the form. For both FMG's and investors, the date of entry as a nonimmigrant. Do not show dates of parole which may have been authorized subsequent to the nonimmigrant entry. In FMG cases,

also show the FMG's medical specialty. The two letter code from the following table must be used:

23 Medical Specialties

AL – Allergy and Immunology	AN – Anesthesiology
CR – Colon and Rectal Surgery	DE – Dermatology
EM – Emergency Medicine	FP – Family Practice
IN – Internal Medic	NS – Neurological Surgery
NM – Nuclear Medicine	OB – Obsterics and Gynecology
OP – Ophthalmology	OR – Orthopedic Surgery
OL – Otolaryngology	PA – Pathology
PD – Pediatrics	PH – Physical Medicine and Rehabilitation
PL – Plastic Surgery	
PS – Psychology and Neurology	PR – Preventive Medicine
SU – Surgery	RA – Radilogy
UR – Urology	TH – Thoracic Surgery

In order to satisfy the requirements of Section 212(k) form I-193 will be utilized to record waivers of 212(a)(14), (20), or (21) as provided in the efficiency legislation. For the time being, when a waiver of excludability of the aforementioned three categories is approved, the form I-193 is to be annotated by crossing out 211(b) as it appears on the form, and indicating in the space to the right, Section 212(k).